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IN THE

Supreme Court of the United States

AMERICAN ISUZU MOTORS, INC., *et al.*,
Petitioners,

vs.

LUNGISILE NTSEBEZA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether this Court should dismiss respondents' soon to be amended claims in the first instance based on case specific deference to the political branches where the United States does not seek review on this question and no lower court has decided the issue.

2. Whether, in the absence of any conflict in the circuit courts on this issue, aiding and abetting liability is unavailable in the abstract under the Alien Tort Statute regardless of the claims respondents will make in their soon to be amended complaints on remand.

3. Whether claims for direct liability for genocide are actionable under the Alien Tort Statute in the abstract, given that respondents may not pursue this claim on remand and that neither the district court nor the court of appeals decided this issue.

PARTIES TO THE PROCEEDING

Respondents in this appeal are:

Ntsebeza and Digwamaje respondents: Lungisile Ntsebeza, Hermina Digwamaje, Andile Mfingwana, F.J. Dlevu, Lwazi Pumelela Kubukeli, Frank Brown, Sylvia Brown, Nyameka Goniwe, Sigqibo Mpendulo, Dorothy Molefi, Themba Mequbela, Lobisa Irene Digwamaje, Kaelo Digwamaje, Lindiwe Petunia Leinana, Matshidiso Sylvia Leinana, Kelebogile Prudence Leinana, David Motsumi, Sarah Nkadimeng, Moeketsi Thejane, Moshoeshoe Thejane, Pascalinah Bookie Phoofolo, Khobotle Phoofolo, Gladys Mokgoro, Jongani Hutchingson, Sefuba Sidzumo, Gobusamang Laurence Lebotso, Edward Thapelo Tshimako, Rahaba Mokgothu, Jonathan Makhudu Lediga, Anna Lebese, Sipho Stanley Lebese, William Nbobeni, John Lucas Ngobeni, Clement Hlongwane and Masegale Monnapula.

Khulumani respondents: Khulumani, Support Group, a non-governmental organization, Sakwe Balintulo, as personal representative of Saba Balintulo, Fanekaya Dabula, as personal representative of Lungile Dabula, Nokitsikaye Violet Dakuse, as personal representative of Tozi Skweyiya, Berlina Duda, as personal representative of Donald Duda, Mark Fransch, as personal representative of Anton Fransch, Sherif Mzwandile Gekiso, as personal representative of Ntombizodwa Annestina Nyongwana, Elsi Guga, as

personal representative of James Guga, Joyce Hlophe, as personal representative of Jeffrey Hlophe, Nomvula Eunice Kama, as personal representative of Mncedisi Dlokova, Joyce Ledwaba, as personal representative of Samuel Ledwaba, Johana Lerutla, as personal representative of Matthews Lerutla, Frieda Z. Lukhulei, as personal representative of Tokkie Lukhulei, Elizabeth Maake, as personal representative of Jackson Maake, Architon Madondo, as personal representative of Mandla Madondo, Benjamin Maifadi, Tshemi Makedama, as personal representative of Lugile Makedama, Mabel Makupe, as personal representative of Andrew Makupe, Mabel Malobola, as personal representative of Malobola Mbuso, Evelyn Matiso, as personal representative of Pitsi Matiso, Betty Mgidi, as personal representative of Jeffrey Mgidi, Elizabeth Mkhonwana, as personal representative of Obed Mkhonwana, Catherine Mlangeni, as personal representative of Bheki Mlangeni, Cecil Mlanjeni, as personal representative of Kele Mlanjeni, Samuel Morudu, as personal representative of Sannah P. Leslie, Tshidiso Motasi, as personal representative of John and Penelope Moloke, Willie Nelani, as personal representative of Mongezi Nelani, Catherine Ngqulunga, as personal representative of Brian Ngqulunga, Catherine Phiri, as personal representative of Thomas Phiri, Elizabeth Sefolo, as personal representative of Harold Sefolo, Maria Sibaya, as personal representative of Jeffrey Sibaya, Patricial M. Songo, as personal

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Moraloki A. Kgobe, Reuben Mphela, Lulamile Ralrala.

RULE 29.6 STATEMENT

There are no corporate respondents subject to this rule.

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RESPONDENTS' BRIEF IN OPPOSITION

The petition for *certiorari* should be denied for a number of reasons. The most important is that none of the questions presented are ripe for review.

Review in this Court at this time would be based on pleadings which are about to be superseded by amended complaints. The court of appeals specifically directed the district court to allow respondents leave to amend their complaints, noting that "we cannot be sure that the pleadings in the record before us represent the final version of the plaintiffs' allegations." *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 260 (2d Cir. 2007). At a scheduled status conference on July 8, 2008, in the district court, respondents will seek leave to file substantially narrowed complaints that conform with the standard set by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Both petitioners and the United States minimize the existence and importance of this procedural posture in their briefs and base their arguments primarily on the claims made in the pre-*Sosa* complaints filed in the *Ntsebeza* and *Digwamaje* cases rather than the narrower versions of these claims to come. Respondents agree that "merely doing business" in South Africa during apartheid cannot give rise to liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Respondents did not and do not make this claim in any of these cases.

Consistent with ordinary procedure, the district court should be given an opportunity to evaluate the respondents' narrowed amended complaints in light of *Sosa* and its guiding principles. A number of fact-intensive inquiries, which are best suited for the district court, would be determined in the first instance on remand. There is no compelling reason why these traditional procedures should be circumvented in these cases.

The court of appeals correctly declined to decide the applicability of any prudential doctrines that may counsel for case specific deference to the political branches based on an incomplete record, stating that it "expect[s] that the district court on remand will rule expeditiously" on these issues. *Khulumani v. Barclay Nat'l Bank*, 509 F.3d 148, 153 (2d Cir. 2007).[1] The United States agrees that the issue of case specific deference is not ripe for review in this Court because no lower court has

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[1] Contrary to the petitioners' suggestion, the court of appeals imposed no unusual procedures on the district court for considering these issues: it did not instruct the district court to hold an evidentiary hearing, Pet. 12, or prescribe the format for the district court's consideration of these issues. All of petitioners' defenses would be considered under well-established principles which have been applied over the years in numerous cases. The district court is in need of no further guidance from this Court at this time about the nature of these inquiries.

issued an opinion on these issues in these cases. U.S. *Amicus* Br. at 17-18.

In addition, in a narrow ruling consistent with the overwhelming consensus among all of the circuit and district courts to have considered the issue, the court of appeals correctly recognized the availability of aiding and abetting liability under the ATS. *Khulumani*, 504 F.3d at 260. Though the judges in the court of appeals issued separate opinions on the substantive standard for aiding and abetting liability, that issue is not ripe for review in the context of these cases. It is an issue that will be decided on remand and is pending in a number of other cases in the circuit courts.

Finally, as the United States agrees, the issue of direct liability for genocide was not decided by either the district court or the court of appeals. Moreover, respondents are likely not to pursue a direct liability claim for genocide on remand, rendering this issue moot.

1. It would be premature and unnecessary for this Court to consider the applicability of prudential doctrines in these cases. Neither the district court nor the court of appeals made *any* ruling in these cases on the applicability of various prudential doctrines that may counsel for case specific deference to the political branches under the ATS. The district court did not resolve these justiciability issues, because it dismissed the cases on jurisdictional grounds. The court of appeals reversed and remanded for consideration of these issues.

Consideration of these prudential doctrines, including the political question doctrine and the doctrine of international comity, requires further factual development in the district court, especially in light of soon-to-be-filed amended complaints, before these issues are ripe for review in this Court.

In denying petitioners' motion to stay the issuance of the mandate, the court of appeals recognized this need, noting that "we expressly *did not decide* this issue [of case-specific deference] on the present record and remanded to the district court for a determination in the first instance," *Khulumani*, 509 F.3d at 152 (emphasis supplied). That is what this Court directed the lower courts to do in *Sosa*, and that is why the United States agrees that the issues of "case specific deference" are not ripe for review. U.S. *Amicus* Br. at 17-18.

It is entirely appropriate and especially important that lower courts have the opportunity to resolve fact-intensive issues such as case specific deference before this Court does so; such matters can only be resolved on the basis of the respondents' actual claims, as amended.

2. In its *per curiam* decision, the court of appeals reached the unexceptional conclusion that those who aid and abet violations of international law that satisfy the *Sosa* standard may be found liable under the ATS. The overwhelming consensus of courts to have addressed the issue have recognized aiding and abetting liability under the ATS. Aiding and abetting liability is firmly grounded in domestic and international authority traceable to the eighteenth century and is fully

consistent with this Court's precedents. Indeed, failure to recognize any theory of aiding and abetting liability under the ATS would grant those complicit in the most egregious human rights crimes an unwarranted immunity and create an anomalous gap in human rights accountability in ATS jurisprudence.

Further, were this Court interested in addressing the issue of aiding and abetting liability under the ATS, these cases would not provide an appropriate vehicle through which to do so.[2] Until respondents amend their pleadings, adjudication of these cases in this Court at this time would require the abstract resolution of legal issues that this Court has traditionally disfavored. In the near future, the district court will also have the opportunity to address the consequences that may or may not flow from different standards for aiding and abetting liability in the context of the specific allegations in respondents' amended complaints. Such consequences depend on what the respondents actually allege and not upon the

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[2] Unlike these cases, pending appeals in the Second Circuit — *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016 (awaiting argument), and *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800 and 06-4876 (awaiting argument)—and one in the Ninth Circuit — *Mujica v. Occidental Petroleum*, No. 05-56175 (argued April 19, 2007, awaiting decision)—squarely present the issue of aiding and abetting liability in the context of operative pleadings and more complete records.

abstract idea of aiding and abetting liability. There is no compelling reason for this Court to interrupt the usual judicial decision-making process in these cases. This is especially true because there are several appeals now pending in the Second and Ninth Circuits which present this issue in the context of more complete records and actual decisions suitable for appellate review. *See* § IIB3, *infra*.

3. The court of appeals' *per curiam* decision did not address the viability of ATS claims under the Genocide Convention and its implementing legislation, let alone resolve them against the petitioners. It is true that District Judge Korman, sitting by designation, argued in *dicta* in his dissent that the implementing legislation somehow bars the inference of a common law cause of action for genocide, but the majority explicitly declined to resolve the issue, "leav[ing] it to the district court to address in the first instance. . ." *Khulumani*, 504 F.3d at 283 n.18 (Katzmann, J., concurring); *id.* at 285-86 (Hall, J., concurring). Judge Korman's solitary position is unpersuasive on its own terms, played no role in the *per curiam* decision, and created no conflict among the circuit courts. It certainly offers no basis for immediate review in this Court, as the United States acknowledges. U.S. *Amicus* Br. at 17-18. Moreover, this claim is included only in the *Khulumani* case, and it may not even be realleged in an amended complaint after remand.

Respondents have not amended their complaints since this Court's decision in *Sosa*. The

court of appeals decision that they should have this opportunity before the issues presented by the petition are decided in the first instance was prudent, correct and fully in accord with this Court's approach in *Sosa*.

STATEMENT OF THE CASE

These cases, consolidated under the name *In re South African Apartheid Litigation*, involve two putative class actions and one case brought by a group of individual victims of apartheid-era abuses in South Africa.[3] In 2002, several complaints were filed in various district courts, and later that year the Judicial Panel on Multidistrict Litigation consolidated the cases for pre-trial proceedings in the U.S. District Court for the Southern District of New York. *See In re S. African Apartheid Litig.*, 238 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2002). The district court evaluated petitioners' motion to dismiss based on complaints filed before this Court's decision in *Sosa*.

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[3] The court of appeals did not draw distinctions between the cases in its *per curiam* decision on the issues relevant to the petition. There were significant differences in the way in which each of these cases were framed below, and it is likely that some differences will remain after the complaints in these cases are amended. However, it will not be clear whether such differences are material to the issues petitioners seek review on in this Court until respondents file their amended complaints.

On November 29, 2004, the district court dismissed these cases, ruling that aiding and abetting liability was not actionable under the ATS. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). The district court explicitly declined to address or rule on the basis of prudential doctrines, including the political question doctrine. *Id.* at 543 n.4.

On October 12, 2007, the United States Court of Appeals for the Second Circuit held that aiding and abetting liability is available in principle under the ATS, *Khulumani*, 504 F.3d at 260, but remanded to the district court to consider whether prudential doctrines of "case-specific deference" counsel dismissal, *id.* at 263, and to consider the consequences of these cases in light not of the hypothesized "doing business" theory but of the actual claims made by respondents on remand, *id.* at 262-63.

In its *per curiam* opinion, the court of appeals "vacate[d] the district court's order denying plaintiffs' motion for leave to amend." *Id.* at 260-61. As the court of appeals noted, the *Ntsebeza* and *Digwamaje* respondents had sought "to provide particularized allegations directed at particular defendants, to 'meet the new *Sosa* standard,' and to clarify for the district court that their ATCA claims were not based upon the corporations 'merely doing business' in South Africa." *Id.* at 259 n.5. The *Khulumani* respondents were given the same opportunity to amend their complaint in light of *Sosa*. *Id.*

On November 27, 2007, the court of appeals denied the petitioners' motion to stay the mandate, stating:

> To grant a stay at this juncture would deprive the district court of the opportunity to address the principal issue upon which the Corporations seek Supreme Court review: whether various prudential doctrines, including case specific deference to the political branches, counsel dismissal of these claims. We expressly did not decide this issue on the present record and remanded to the district court for a determination in the first instance.

Khulumani, 509 F.3d at 152. The court of appeals noted that these issues have not been sufficiently developed to be suitable for Supreme Court review, and made clear its expectation that on remand the district court would rule on such issues expeditiously. *Id.* at 152-53.

At a status conference in the district court now scheduled for July 8, 2008, respondents will seek leave to amend their original complaints in light of the rulings of this Court in *Sosa* and the court of appeals in its decision below. Thus, by the time this Court heard argument in these cases respondents would have amended their pleadings and the cases would be considerably different from the complaints petitioners attack in their petition.

Respondents will clarify that they do not seek relief based on "merely doing business" in South Africa, Pet. 1; U.S. *Amicus* Br. at 13, and will

allege facts establishing the liability of each defendant corporation remaining in these cases either on direct or aiding and abetting liability theories.

Respondents do not—and will not after amendment—seek $400 billion in damages, Pet. 5, nor do they advance a theory of liability based merely on "doing business in or with South Africa." Pet. 1. In those cases in which the initial pre-*Sosa* claims for broad equitable relief triggered opposition from the South African government, the *Ntsebeza* and *Digwamaje* respondents have represented that they will not seek broad equitable relief in the form of affirmative action programs, a historical commission, revision of the educational system, and the like. The *Khulumani* respondents never sought such relief. Nor will respondents in their narrowed and amended complaints pursue claims on behalf of millions of South African citizens. The *Khulumani* case is not a class action, and the *Ntsebeza* and *Digwamaje* cases may not be pursued as class actions on remand and will in any event be framed more narrowly than the complaints dismissed by the district court.

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF "CASE SPECIFIC DEFERENCE" IS NOT RIPE FOR REVIEW.

As recognized by the United States in its *amicus curiae* submission, neither the district court nor the court of appeals has issued any ruling on the applicability of case specific, prudential doctrines in these cases. U.S. *Amicus* Br. 17-18. In the court of appeals, petitioners conceded that "case specific deference" is not a separate doctrine requiring automatic deference to the wishes of the executive branch or foreign governments, but refers instead to a variety of well-established justiciability doctrines, including the political question doctrine and the doctrine of international comity. Pet'r's Joint Appellees' Br. at 67-68; *see also Khulumani*, 504 F.3d at 262 n.10. The scope of these doctrines has been well-settled and widely applied for decades, and there is nothing in these cases that would require this Court to revisit these doctrines now in the absence of a lower court decision. Even if that were not the case, these doctrines require fact-intensive inquiries in which no court has yet engaged, and do not merit consideration by this Court before the district court addresses these issues in the first instance.

Further, the potential applicability of these prudential doctrines can only be resolved in the specific context of respondents' actual claims, as amended or abandoned, rather than in the context

of their pre-*Sosa* claims. As a result of the court of appeals' *per curiam* disposition, no operative pleadings currently exist in these cases, and respondents intend to substantially amend and narrow their claims in response to both *Sosa* and the court of appeals' ruling. Since "we cannot know how these developments will affect the positions of the United States and South Africa with respect to this litigation," *Khulumani*, 504 F.3d at 263 n.13, this Court should not preempt the district court's consideration of these issues.

A. The Court Of Appeals Correctly Remanded To Address Issues Of "Case Specific Deference" Because There Has Been No Decision By The District Court On This Issue.

The district court made no rulings on "case specific deference." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 543 n.4 ("Defendants also argue that . . . the matter is a non-justiciable political question. Given the Court's finding that defendants are entitled to relief on other grounds, the Court need not address [this] remaining ground[] for defendants' motion [to dismiss]." (citation omitted)). The court of appeals, rejecting the district court's jurisdictional analysis, vacated its dismissal of respondents' claims and remanded these cases for further proceedings, understanding that on remand the district court would address any issues raised by prudential doctrines "expeditiously." *Khulumani*, 509 F.3d at 152.

Instead of litigating these issues in the district court, petitioners sought to stay the litigation pending their petition for *certiorari*. In denying the stay, the court of appeals explained why these cases are not ripe for Supreme Court review:

> The critical weakness in the Corporations' motion is its premise that this issue has been sufficiently developed as to be fit for review by the Supreme Court. Contrary to the Corporations' suggestion, "the district court explicitly refrained from addressing the defendants' arguments that the ATCA claim presented a non-justiciable political question." Accordingly, we did not address the applicability of case specific deference or other prudential doctrines because such questions require the type of careful case-by-case analysis to which district courts are better suited in the first instance. . . . We also note that it has been several years since this issue has been briefed, and the parties should be able to develop the record to take into account intervening developments.

Khulumani, 509 F.3d at 152-153 (citations omitted).[4]

Nevertheless, petitioners now ask this Court to determine the applicability of these doctrines before the lower courts have had the opportunity to do so. This request is contrary to the general practice of this Court to rarely grant review on issues both lower courts have declined to reach. *See* Robert L. Stern et al., *Supreme Court Practice* 421 (8th ed. 2002). It is also in conflict with the view of the United States that "because there is no decision of the court of appeals on [these] issues, review by this Court of [these] issues is not warranted at this time." U.S. *Amicus* Br. at 18.

To support their claim that these cases should be dismissed based upon "case-specific deference" petitioners rely on footnote 21 in *Sosa*, 542 U.S. at 733 n.21, which referenced the original, pre-*Sosa* versions of these cases in suggesting that courts might at times accord some degree of deference to the Executive's views concerning the policy consequences of ATS cases. Pet. 14. In directing the district court to decide these issues first, and by giving all respondents the opportunity to reframe and narrow their claims in conformity with *Sosa*, the court of appeals' decision is entirely consistent with footnote 21. Footnote 21 does not

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[4] The majority also based its view on the unexceptional conclusion that subject matter jurisdiction under the ATS should ordinarily be addressed before issues of justiciability. *Khulumani*, 504 F.3d at 291-92 (Hall, J., concurring).

contemplate that this Court would examine arguments for case specific deference in the first instance.

The cases petitioners cite for the proposition that dismissal on the basis of prudential doctrines should occur at the earliest opportunity are also inapposite to these cases in their current posture; to the contrary, they confirm that district courts are the appropriate forum for initial consideration of such issues.[5]

In each case cited by petitioners, either this Court or the respective court of appeals based its review on a district court decision that reached the prudential questions at hand. For example, in *Tenet v. Doe*, 544 U.S. 1 (2005), this Court affirmed dismissal under the "*Totten* bar" only after the district court had analyzed the particular factors that would counsel for case specific deference and had addressed the *Totten* bar issue. *See id.* at 3, 5-6.

Likewise, in *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), the court of appeals affirmed dismissal based on the political question doctrine only after the relevant facts and issues

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[5] The court of appeals specifically recognized that the application of the international comity doctrine "'ordinarily lies within the discretion of the district court.'" *Khulumani*, 504 F.3d at 262 (quoting *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006)).

were fully briefed and decided by the district court.[6] *See Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 65-67 (D.D.C. 2001). In these cases, neither the district court nor the court of appeals decided the factual issues relating to case specific deference, and the precise legal questions in controversy will not be clear until petitioners file their post-*Sosa* amended complaints.

In *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), the Ninth Circuit dismissed the case on political question grounds but only after the district court had considered the issue, basing its ruling on specific evidence submitted by the United States that the contracts at issue between Caterpillar, Inc., and Israel were all approved by the Government. *Id.* at 982-83. Here, unlike in *Corrie*, the district court did not analyze the potential applicability of any prudential doctrines, rendering review of these issues prior to consideration by the district court inappropriate.

Petitioners ask this Court to relieve them of the obligation to litigate this question in the lower

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[6] The district court in *Joo* also found that there was no subject matter jurisdiction over plaintiffs' claims. The court of appeals affirmed based on the district court's alternative holding that the case was barred by the political question doctrine. *Joo*, 413 F.3d at 46. Here, the court of appeals recognized that it would be inappropriate to address prudential doctrines, since the district court declined to either analyze any prudential issues or provide an alternative holding. *See Khulumani*, 504 F.3d at 262-63.

courts before seeking review in this Court. Such a departure from traditional norms of adjudication of such issues is not justified.

B. The Issue Of Case Specific Deference Is Not Ripe For Review.

Since prudential doctrines require case specific analysis, their potential applicability should only be assessed based on respondents' actual allegations as amended, not on the basis of superseded complaints or abandoned claims. The court of appeals recognized that permitting the district court to address issues related to case specific deference in the first instance is "particularly appropriate" in these cases because respondents "would narrow their claims and clarify the nature of their allegations against the various defendants, changes that may affect how the district court ultimately decides to resolve these issues." *Khulumani*, 504 F.3d at 263 (citing Jan. 24, 2006, Transcript of Oral Argument, at 7-8, 14-15, *Khulumani*, 504 F.3d 254 (No. 1466); *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619-20 (D.C. Cir. 2006)).

Respondents recognize that the United States and South African governments perceive certain claims for relief asserted in respondents' pre-*Sosa* complaints to be troubling, and respondents intend to address those concerns and narrow the claims in their amended complaints accordingly. There is no way for this Court to predict how these governments will respond to the

claims in amended complaints. 504 F.3d at 263 n.13. Given the pre-*Sosa* proceedings in these cases, it is likely that the district court would give the United States and South African governments the opportunity to indicate whether the amendments to respondents' complaints resolve some or all of the previously expressed concerns.

Nor should this Court examine the rationales for deference in the abstract, without the "clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). Instead, this Court should permit the district court to apply fact-sensitive prudential doctrines to the actual specifics of these cases, a process which has not occurred at all to date. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 377-78 (3d Cir. 2006) (political question doctrine requires "discriminating inquiry into the precise facts and posture of the particular case") (citation omitted); *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005) ("It is incumbent upon us to examine each of the claims with particularity."), *cert. denied*, 546 U.S. 1137 (2006); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (relevant considerations must be evaluated "on a case-by-case basis").

Petitioners claim that these cases significantly harm U.S. relations with South Africa and disrupt U.S. policies of encouraging economic engagement. Pet. 15-16. The evaluation of such

assertions is appropriately reserved for the district court in the first instance. The court of appeals has directed the district court to address these issues on remand, and there is no need for this Court to address them first. The United States agrees that issues of case specific deference must be considered first by the district court before they are ripe for review in this Court. U.S. *Amicus* Br. at 18.

On remand, the district court will weigh the interests asserted by various governments in the context of substantially narrowed complaints under the well-established principles governing the political question and international comity doctrines. The lower courts have ample guidance to develop an adequate record and decide these issues "expeditiously," *Khulumani*, 509 F.3d at 153, based on long-established precedents. These are not new doctrines, and these cases present no exceptional issue necessitating a decision by this Court before the district court makes an initial decision on these matters.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DECIDE THE ISSUE OF AIDING AND ABETTING LIABILITY ON THIS RECORD.

The court of appeals' narrow *per curiam* holding that aiding and abetting liability under the ATS is available in some circumstances creates no circuit split and is fully consistent with this Court's jurisprudence. The United States' argument that this Court should review that ruling rests primarily

on "policy consequences." U.S. *Amicus* Br. at 1-3, 15, 18-22. However, the court of appeals specifically directed the district court to address any policy issues arising from this litigation in the context of amended, and substantially narrowed, complaints. *Khulumani*, 504 F.3d at 263.[7] This prudent approach ensures that any further decision on the availability of aiding and abetting liability is made in the context of more specific allegations than were contained in respondents' pre-*Sosa* pleadings.

A. The Court Of Appeals' Narrow Holding On The Availability Of Aiding And Abetting Liability Follows The Consensus Of The Lower Courts And Is Consistent With This Court's Decisions.

1. No Circuit Split Exists On The Narrow Issue Of The Existence Of Aiding And Abetting Liability.

The court of appeals vacated the district court's dismissal of respondents' ATS claims,

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[7] When it is "premature for the Court to participate in a certain controversy," or it "wants to receive more information," or "if the Court thinks that additional discussion, in lower courts . . . is likely to be productive," the "passive virtues" make it "prudent to wait." Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 6, 51 (1996).

holding only "that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATS." *Khulumani*, 504 F.3d at 260.

There is no split among the circuits on this issue. A long line of cases, before and after *Sosa*, recognizes aiding and abetting liability under the ATS.[8] The court of appeals' opinion below simply followed this overwhelming consensus in the lower federal courts.

Petitioners can point to only two district court decisions purportedly departing from this consensus. Pet. 24 (citing *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C 2005); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005). However, petitioners misconstrue *Corrie*, which held merely that "[p]laintiffs' claim of aiding

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[8] *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 463-64 (S.D.N.Y. 2006); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1172-74 n.6 (C.D. Cal. 2005); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 321 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997); *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 777-78 (9th Cir. 1996) (recognizing command responsibility under the ATS).

and abetting fails because where a seller merely acts as a seller, he cannot be an aider and abettor," and did not suggest that a bona fide claim of aiding and abetting would similarly fail. *Id.* at 1027. *Doe*'s rejection of aiding and abetting liability, meanwhile, rested simply on the court's reliance on the district court's erroneous reasoning in these cases. *Doe*, 393 F. Supp. 2d at 24. The "confusion" that petitioners insist exists in the lower courts, Pet. 24, does not exist, and, to the extent it did exist, was caused by the district court's now-reversed decision.

The issue of aiding and abetting liability, of course, arises not only in the context of human rights claims against corporations. For example, aiding and abetting liability is a crucial vehicle to hold individual perpetrators who facilitate torture, summary execution, genocide, and other egregious human rights violations accountable. The abstract ruling sought by petitioners and the United States would undermine the effectiveness of the ATS in a range of cases contemplated by this Court in *Sosa*.

As was the case in *Sosa* itself, this Court should await further decisions in several pending cases presenting the various aspects of the aiding and abetting issue before deciding these issues. It remains to be seen whether any conflict between the circuits will emerge at all.

2. The Court Of Appeals' Decision Does Not Conflict With This Court's Jurisprudence.

In *Sosa*, this Court placed some limits on the recognition of new actionable norms of international law, but stressed that its holding was "generally consistent with the reasoning of many of the courts and judges who [construed the ATS] before it reached this Court." 542 U.S. at 732.

In order to escape the import of *Sosa*, petitioners and the United States assert that aiding and abetting liability should not attach to *extraterritorial* conduct. Pet. 32-33; U.S. *Amicus* Br. at 12. Yet in approving of the general approach of the lower courts to ATS litigation, this Court *explicitly* referenced cases and opinions that clearly recognized the applicability of the ATS to extraterritorial conduct. *Sosa*, 542 U.S. at 732 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)). There is no evidence that Congress intended the reach of the ATS to be limited to actions occurring on U.S. territory. It is petitioners', not respondents', view of the ATS that is fundamentally inconsistent with *Sosa*.

Petitioners, and the United States, are also incorrect that the court of appeals took inadequate account of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994). *Central Bank* involved an attempt to imply

aiding and abetting liability in the context of a complex regulatory scheme. Addressing the aiding and abetting issue principally with reference to Congress' regulation of securities, this Court noted that there had been a "deliberate congressional choice" to not permit aiding and abetting liability in securities cases. *Id.* at 184. There is no evidence of a similar intent in the context of the ATS.

Unlike the 1934 Securities Act analyzed in *Central Bank*, the drafters of the ATS expected aiding and abetting liability to attach, as the early history of the statute confirms. Attorney General Bradford concluded in 1795 that the ATS covered liability for "committing, *aiding, or abetting*" violations of the laws of war arising extraterritorially. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795) (emphasis supplied).[9] Similarly, this Court held in 1795 that a French citizen who had aided a U.S. citizen in unlawfully capturing a Dutch ship acted in contravention of the law of nations and was civilly liable for the value of the captured assets. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795).[10]

Given this history, a more apt analogy than the 1934 Securities Act is the civil remedy

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[9] Attorney General Bradford's opinion also applied the ATS to extraterritorial conduct without hesitation.

[10] Blackstone himself recognized that those who aided or abetted piracy, the paradigmatic ATS norm, were liable as pirates. William Blackstone, Commentaries on the Laws of England, Book IV, Chap. 5 (1769).

provision of the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, which, as with the ATS, Congress intended to incorporate ordinary principles of tort liability. Indeed, Congress' expectation that the federal courts would apply common law tort principles in ATS cases is unmistakable in light of the history examined in this Court's *Sosa* decision. *Sosa*, 542 U.S. at 721-24. In supporting the availability of aiding and abetting liability in ATA cases, the United States noted that §2333(a) creates a common law tort claim and, like the ATS, "precisely specifies the range of possible plaintiffs, but simply does not address - and thus in no way restricts - the range of possible defendants." Brief of United States as *Amicus Curiae* Supporting Affirmance, at 10, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (Nos. 01-1969, 01-1970), 2001 WL 34108081. According to the U. S. brief in *Boim*, restrictions on liability "must arise, if at all, from background tort principles that Congress presumably intended to incorporate." *Id.* The Seventh Circuit adopted this reasoning. *Boim*, 291 F.3d at 1010.

The history and purpose of the ATS, thus, contrasts markedly with the history of the 1934 Securities Act, and the court of appeals correctly declined petitioners' invitation to stretch *Central Bank* to govern these cases.

B. This Court Should Not Decide The Issue Of Aiding and Abetting Liability As An Abstract Matter.

Consideration of "sterile legal issues," divorced from the factual contexts that ground legal analysis, leads to "sterile conclusions unrelated to actualities." Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1003 (1924). "Wise adjudication has its own time for ripening," *State of Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari), and this Court should not grant review in these cases to consider a sterile legal issue in a setting devoid of concrete facts. This Court has long recognized both that "[a] case may raise an important question but the record may be cloudy," *id.* at 918, and that it is premature to consider cases that lack the "clear concreteness" necessary for sound adjudication. *Fruehauf*, 365 U.S. at 157.

Because the factual allegations of aiding and abetting liability in these cases remain in flux, this Court should decline the invitation to consider the aiding and abetting issue through the vehicle of these cases.

1. Petitioners' Mischaracterization Of Respondents' Claims Makes These Cases An Inappropriate Vehicle To Consider This Issue.

Both the United States and petitioners characterize these cases as seeking liability for "doing business" in South Africa; *see, e.g.*, U.S. *Amicus* Br. at 1, 13; Pet. i, 5. Those foreign governments expressing concern about the foreign policy ramifications of these cases in their pre-*Sosa* formulations have similarly operated under the assumption that these cases concern allegations of merely "doing business" with the apartheid regime.[11]

Respondents, however, do not assert liability on that basis and will not assert such claims in their amended pleadings. As the court of appeals recognized, respondents should be given the

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[11] *See* Letter from Nigel Sheinwald, British Ambassador to the United States, to Condoleezza Rice, U.S. Sec'y of State (Jan. 30, 2008). U.S. *Amicus* Br. App. at 4a (stating that the allegations made by the plaintiffs are principally that the corporate defendants did business in South Africa during the apartheid era"); Aide Memoire from the Government of Switzerland (Dec. 2007), U.S. *Amicus* Br. App. at 8a (stating that the cases are "based on allegations that the defendants were 'doing business' in South Africa); Brief of *Amicus Curiae* Republic of South Africa in Support of Affirmance, Pet. App. at 297a (characterizing these cases as "against corporations that did business with and in South Africa during the apartheid period").

opportunity on remand "to clarify for the district court that their ATCA claims were not based upon the corporations 'merely doing business' in South Africa." *Khulumani*, 504 F.3d at 259 n.5.

Were this Court to grant review of these cases before respondents can clarify the actual nature of their allegations, this Court would be deprived of the valuable information that is conveyed when legal questions are assessed in view of their real-world applications. Instead, were it to review the availability of aiding and abetting liability as a purely abstract matter, this Court would risk issuing an advisory opinion divorced from the factual context of these cases.

Petitioners' persistent mischaracterization of these cases further undermines the Government's argument that these cases, in their current form, provide an appropriate vehicle to litigate the aiding and abetting issue because they "vividly illustrate[]" the potential "adverse foreign policy consequence" that might result from the availability of such liability. U.S. *Amicus* Br. at 19. This argument rests on a misreading of *Sosa*,[12] but even if it were correct, it would require this Court to undertake an analysis for which the factual context of these cases would be uniquely unhelpful.

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[12] It should be noted that the Administration has not sought legislative action to address these policy concerns either before or after the *Sosa* decision, even though the issues it raises are, at bottom, a disagreement with the desirability of the ATS altogether.

Since these cases in their current form "vividly illustrate" nothing beyond the potential policy consequences of hypothetical or superceded claims, reviewing them at this stage would be of no help to this Court were it to conduct the analysis advocated by the Government.

Moreover, as the court of appeals noted, the district court has only discussed the potential consequences of the "specific norm it was then discussing, (*i.e. doing business in South Africa*)," *Khulumani*, 504 F. 3d at 263 (emphasis supplied). Therefore, even if the Government was correct that the policy consequences of these cases should be assessed in clarifying the availability of aiding and abetting liability, review in this Court would be premature: this Court's longstanding practice requires that any asserted consequences be first aired in the district court.[13] *See, e.g.*, *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

2. The Lower Courts Should Be Permitted To Continue Developing The Standard For Aiding And Abetting Liability.

Instead of considering these cases in their current, inchoate procedural context, this Court should allow the lower courts to address the

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[13] The district court's consideration of this issue may benefit from empirical data and other materials which ought to be examined in the district court initially.

potential consequences of the scope of aiding and abetting liability under the ATS.

As petitioners' note, Pet. 24-25 & n.4, the court of appeals issued separate opinions on the standard for aiding and abetting liability under the ATS. However, as the United States argued with respect to a similarly divided panel in an ATS case in the D.C. Circuit, "absent a circuit conflict, differences of opinion arising within a single panel regarding the scope and application of a particular statute, however sharply stated, do not warrant this Court's exercise of certiorari jurisdiction." Brief of United States as *Amicus Curiae* ("U.S. *Tel-Oren* Br.") at 10, *Tel-Oren v. Libyan Arab Republic*, 470 U.S. 1003 (1985) (mem.) (No. 83-2052), *denying cert to Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984), *reprinted in* 24 I.L.M. 427 (1985). As the lower courts resolve the scope of such liability in other cases with more complete records, a later decision "may well produce a majority opinion" or result in "rehear[ing] the case en banc to resolve the question." *Id.* at 11.

Moreover, the continuing process of lower courts' applying reasoned analysis to the scope of aiding and abetting liability alleviates any concern about the impact of the existence of such liability in the abstract. *Sosa*, 542 U.S. at 732-33.[14]

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[14] For example, in light of foreign governments' concerns with the prospect of liability for merely "doing business," *see, e.g.*, Letter from Nigel Sheinwald, British Ambassador to the United States to Condoleezza Rice, U.S. Sec'y of State (Jan. 30, 2008), U.S. *Amicus* Br. App.

By declining to review these cases now, this Court will permit that salutary process to unfold, as the lower courts calibrate the appropriate scope of aiding and abetting liability in light of all of the considerations and concerns discussed in *Sosa*, 542 U.S. at 732-33, and the purposes the *Sosa* Court found the ATS to embody. *Id.* at 724-25. The court of appeals' decision contemplates a full consideration of all issues relevant to the scope of aiding and abetting liability by the district court on remand. 504 F.3d at 262 n.12.

3. Other Cases With More Complete Records Would Provide This Court The Opportunity To Consider The Issue Of Aiding And Abetting Liability.

Even if this Court decides it should review the question of aiding and abetting liability, there are several cases pending appeal that will present the aiding and abetting issues in the context of

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at 4a, lower courts crafting the scope of aiding and abetting liability are likely to clarify that liability base only on "doing business" falls outside the scope of "aiding and abetting." *See, e.g., Corrie*, 403 F. Supp. 2d at 1027 ("Plaintiffs' claim of aiding and abetting fails because where a seller merely acts as a seller, he cannot be an aider and abettor."). Indeed, it is not clear that any plaintiff in any ATS case has advanced such an argument.

clearer allegations and pleadings that are not in flux, as in these cases.

The Ninth Circuit is currently reviewing an ATS case alleging aiding and abetting liability. *Mujica v. Occidental Petroleum*, No. 05-56175. *Mujica* was argued in April 2007 and is awaiting decision.[15] In the Second Circuit, *Presbyterian Church of Sudan v. Talisman*, No. 07-0016, and *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800 and 06-4876, present the aiding and abetting issues raised in the petition but also in the context of more complete records and operative pleadings. The *Talisman* and *Kiobel* appeals are fully briefed and are awaiting argument and decision.[16]

Awaiting resolution of one or more of these cases would "permit this Court to review the complex issues raised by the petition after they have been more fully considered by the lower federal courts." U.S. *Tel-Oren* Br. at 12.

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[15] The *Mujica* appeal was withdrawn from submission pending the *en banc* decision in *Sarei v. Rio Tinto, PLC*, 487 F. 3d 1193 (9th Cir.), *vacated, reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007) (argued *en banc* October 11, 2007, awaiting decision).

[16] Although the United States notes that the court of appeals' decision will have precedential effect in pending cases in the Second Circuit, U.S. *Amicus* Br. at 22, the Second Circuit could overturn its prior precedent sitting *en banc* in one of these cases. Further, nothing precludes this Court from granting review in one of these cases after these appeals.

III. CERTIORARI SHOULD BE DENIED BECAUSE NO DIRECT LIABILITY CLAIM FOR GENOCIDE IS RIPE FOR REVIEW.

The *Khulumani* respondents may not pursue any direct liability claims for genocide on remand. Thus, it would be inappropriate for this Court to issue an advisory opinion on that issue. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 200-01 (1988). In any event, as the United States has suggested, this issue is not ripe for review in this Court. U.S. *Amicus* Br. at 18. Neither the district court nor the court of appeals decided this issue, and the issue should be decided by the district court in the context of respondents' amended complaints on remand.

Dated: March 27, 2008

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